

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

8-9-77

77-5011

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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In the Matter

of

REA HOLDING CORPORATION,
THE EXPRESS COMPANY, INC.,
REA EXPRESS, INC., f/k/a
Railway Express Agency, Inc.,
REXCO SUPPLY CORPORATION,

Bankrupts,

BROTHERHOOD OF RAILWAY, AIRLINE,
AND STEAMSHIP CLERKS, FREIGHT
HANDLERS, EXPRESS AND STATION
EMPLOYES,

and

WISEHART, FRIOU & KOCH,

Appellants.

-----X

BRIEF OF APPPELLANT,
BROTHERHOOD OF RAILWAY, AIRLINE AND
STEAMSHIP CLERKS, FREIGHT HANDLERS,
EXPRESS AND STATION EMPLOYES

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REA HOLDING CORPORATION,
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REXCO SUPPLY CORPORATION,

Docket Nos. 77-5011
and 77-5012

Bankrupts,

BROTHERHOOD OF RAILWAY, AIRLINE,
AND STEAMSHIP CLERKS, FREIGHT
HANDLERS, EXPRESS AND STATION
EMPLOYES,

and

WISEHART, FRIOU & KOCH,

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BRIEF OF THE APPELLANT
BROTHERHOOD OF RAILWAY, AIRLINE AND
STEAMSHIP CLERKS, FREIGHT HANDLERS,
EXPRESS AND STATION EMPLOYES

This matter is before this Court on appeal from
an Order and Judgment of the United States District Court for
the Southern District of New York, Charles M. Metzner, U.S.D.J.,
dated March 28, 1977, which was entered on March 30, 1977.
The Order of Judge Metzner approved, with a reduction in
allowances to counsel, a Certification on Application for
interim and final allowances pursuant to Rule 16(c) of the
Bankruptcy Rules, as amended, S.D.N.Y. Appellant, Brotherhood

of Railway, Airline and Steamship Clerks, Freight Handlers,
Express and Station Employes (BRAC) appeals from so much of
the order as approved the application for interim allowances
to the Trustee and to General Co-counsel of the Trustee.

I

STATEMENT OF THE ISSUES

The issues presented on appeal are:

1. Whether the Bankruptcy Judge in recommending and the District Judge in awarding an interim allowance to the Trustee, erred in making such allowance prior to the determination of a separate proceeding then pending before the Bankruptcy Judge which, inter alia, sought to disqualify the Trustee and his counsel.

2. Whether it was error for the Bankruptcy Judge to deny this appellant's counsel an opportunity to question the Trustee concerning a conflict of interest.

3. Whether the allowance to the Trustee was excessive under the circumstances.

II

STATEMENT OF THE CASE

This is an appeal from an Order and Judgment of the District Court which approved, with a modification as to counsel fees, a certification of the Bankruptcy Judge recommending interim allowances to the Trustee and his General Co-counsel.

On March 15, 1977 Bankruptcy Judge Galgay submitted his Certificate on Application for Interim and Final Allowances pursuant to Rule 16(c) of the Bankruptcy Rules, as amended, S.D.N.Y. The Certificate recommended an interim allowance to the Trustee of \$50,000.00 and disbursements of \$291.02 for the period June 1, 1976 through December 31, 1976. It also recommended a joint interim allowance to the Trustee's General Co-counsel of \$650,000.00 plus out-of-pocket expenses to the firm of Whitman & Ransom of \$14,533.97 and Marcus & Angel of \$2,815.08. There were also some additional recommendations for allowances which are not relevant here.

The matter was then put on the Miscellaneous Motion Calendar of the District Court. The Order of the District Court approved the recommendations except that the Co-counsel allowance was reduced to \$455,000. Judge Metzner stated that he never allowed more than 50 percent of billable time for such an allowance.

The application for these allowances first came on for hearing before the Bankruptcy Judge on February 18, 1977.

On that date the Trustee testified that he had devoted approximately 515-1/4 hours to the bankrupt estate from June 1, 1976 to December 31, 1976. He guessed that he devoted about two thirds of his time to the estate. The allowance as made amounts to a rate of slightly in excess of \$97.00 per hour.

The examination of the Trustee was then adjourned until February 28, 1977. At that time counsel for this appellant attempted to question the Trustee about possible conflict of interest. However, the Bankruptcy Judge refused to permit this line of questioning. He limited counsel to questioning as to whether or not the services claimed in the application for services performed were reasonable.

ARGUMENT

There should have been a determination as to whether or not a conflict of interest existed before any allowances were made to the Trustee or his counsel. The Bankruptcy Judge was well aware that a claim had been made alleging that a conflict of interest existed. The claim had been advanced before him on many occasions prior to the hearing on the allowances. Whether or not they had been properly advanced before him is not at issue here. The fact is that he had ample knowledge of the claim. It even appears that he took cognizance of the claim and was prepared to rule on it. As recently as February 15, 1977, he had accepted final submissions of papers from the Trustee's counsel and from the firm of Wisehart, Friou and Koch in a proceeding brought by the Trustee to disqualify the Wisehart firm. As part of that proceeding the Wisehart firm claims to have brought a cross-motion to disqualify the Bankruptcy Judge himself as well as the Trustee and his counsel. The grounds specified against both the Trustee and his counsel were that there was conflict of interest.

With this as a background the Bankruptcy Judge entertained proceedings for the award of interim allowances to the Trustee and his counsel. The hearings began on February 18, 1977 and were continued on February 28, 1977. This appellant by its counsel appeared in the hearings and attempted to elicit testimony concerning the alleged conflict of interest. Each

time counsel attempted to explore the area the Bankruptcy Judge stopped him. Counsel was confined to questioning whether or not the applications were unreasonable in view of the time and services claimed. But that begs the issue. The issue sought to be raised and precluded by the Bankruptcy Judge was not the amount and value of services performed. It was more basic than that. It was whether there existed facts which would prevent the award of allowances irrespective of what services were performed. The Bankruptcy Judge's ruling prevented inquiry into this area. The result is that allowances have been made and appellant has been denied an opportunity to discover if there are reasons why no allowances should be made.

This Court recently had occasion to consider allowances where there was an actual conflict of interest. Matter of New York, New Haven & Hartford Railroad Company; Ianotti v. Manufacturer's Hanover Trust Company, ____ F2d ____, Dkts. 76-5025, 76-5033, 76-5037 (2d Cir. Mar. 18, 1977). An Indenture Trustee was authorized an allowance even though a conflict of interest existed. The unique circumstances of the case led to this Court's affirmance of the award made by the District Court. The opinion of this Court recognizes that there are circumstances where a conflict of interest exists in which allowances may be awarded. There were facts in the record to justify the award in spite of the conflict. Equitable principles supported the award. No such approach could be made in this

case. We don't yet know whether a conflict of interest exists.

In the Ianotti case, this Court carefully synthesized the holdings in a number of cases relating to the problem. It is instructive to note that in each of them there had been a finding of conflict of interest.

But here the Bankruptcy Judge would not allow a record to be developed. Appellant should have, at the very least, been afforded an opportunity to explore the issue and develop a record.

B

The allowance awarded the Trustee is excessive. By his own testimony he devoted 515.25 hours to the bankrupt estate over a seven month period. The allowance, which is net to the Trustee since his office expense is paid by the estate, amounts to slightly more than \$97.00 per hour. In a recent decision the Court of Appeals for the Ninth Circuit, Matter of Beverly Crest Convalescent Hospital Inc., 548 F. 2d 817 held that its conscience was shocked by an allowance of \$85.00 per hour to the Trustee. This, it was stated, was almost four times the hourly rate of the Judge who made the award. It was reduced to \$50.00 per hour, which the Court stated was approximately twice the hourly rate of the Judge.

In his report the Bankruptcy Judge states that among the reasons for awarding the requested fee he has con-

sidered the extremely diligent and conscientious attention to every detail in the administration of the estate and the actions taken on the Trustee's own initiative. By way of example, he points out the active development of the Rexco operation and the development of a saleable asset out of the bankrupt's operating rights.

Surely the Bankruptcy Judge was not unaware that the Interstate Commerce Commission had concluded that the Rexco operations had been in the nature of wilful violations of the Commission's requirements. Indeed there is pending in this very Court, in Docket 76-4278, a proceeding to review the orders of the Interstate Commerce Commission which revoked the principal temporary authority and dismissed the permanent authority applications under which the bankrupt had been operating since 1968. Unless this Court reverses, enjoins, annuls and sets aside the orders of the Interstate Commerce Commission there may not be operating rights which can be sold. The examples which the Bankruptcy Judge used to support his recommendation might well lead one to an opposite conclusion in the present posture.

In any event, even if an award of allowances were sustainable, it should be at the lower end of the spectrum of reasonableness. Matter of First Colonial Corp. of America, 544 F. 2d 1291 (5th Cir. 1977). The award here is more than generous if you consider the number of hours spent over a seven month period and the fact that the Trustee has no overhead expense.

CONCLUSION

The order of the District Court should be reversed and the matter remanded to the Bankruptcy Judge for further proceedings.

Respectfully submitted,

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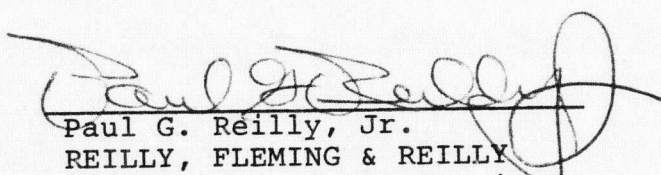
Certificate of Service

I certify that I have served the Brief of
Petitioner and Appendix upon all parties of record to
this proceeding by causing to be delivered two copies
of each:

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